

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	
Application by SBC Communications,)	
Inc., Nevada Bell Telephone Company,)	WC Docket No. 03-10
and Southwestern Bell Communications)	
Services, Inc. for Provision of)	
In-Region, InterLATA Services in)	
the State of Nevada)	

EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

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DOJ California Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application by SBC Communications, Inc., Pacific Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in California</i> , FCC WC Docket No. 02-306 (Oct. 29, 2002), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Georgia/Louisiana I Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region InterLATA Services in Georgia and Louisiana</i> , FCC CC Docket No. 01-277 (Nov. 6, 2001), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
DOJ Louisiana I Evaluation	Evaluation of the U.S. Department of Justice, <i>In re: Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Louisiana</i> , FCC CC Docket No. 97-231 (Dec. 10, 1997), available at < http://www.usdoj.gov/atr/public/comments/sec271/sec271.htm >.
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<i>FCC Kansas/Oklahoma Order</i>	Memorandum Opinion and Order, <i>In re: Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma</i> , 16 FCC Rcd 6237 (Jan. 19, 2001), available at < http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications >, <i>aff'd in part, remanded in part, Sprint Communications Co. v. FCC</i> , 274 F.3d 549 (D.C. Cir. 2001).
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PUCN Pricing Order I	Order, <i>In re: Filing of Nevada Bell's Unbundled Network Element (UNE) Cost Study</i> , PUCN Docket No. 98-6004 (Feb. 1, 1999), attached to SBC Br. App. E as Tab 21.
PUCN Pricing Order II	Order, <i>In re: Filing of Nevada Bell's Unbundled Network Element (UNE) Cost Study</i> , PUCN Docket No. 98-6004 (May 11, 1999), attached to SBC Br. App. E as Tab 23.
PUCN Pricing Order III	Order, <i>In re: Filing by Nevada Bell of its Unbundled Network Element (UNE) Nonrecurring Cost Study Pursuant to the Order Issued in Docket No. 98-6004</i> , PUCN Docket No. 99-12033, <i>et al.</i> (Sept. 18, 2000), attached to SBC Br. App. E as Tab 35.
PUCN Pricing Order IV	Order, <i>In re: Filing by Nevada Bell of Its Unbundled Network Element (UNE) Nonrecurring Cost Study Pursuant to the Order Issued in Docket No. 98-6004</i> , PUCN Docket No. 99-12033, <i>et al.</i> (Nov. 20, 2000), attached to SBC Br. App. E as Tab 36.
PUCN Pricing Order V	Order, <i>In re: Petition of Nevada Bell Telephone Company for an Order Commencing a Proceeding to Determine New Costs and Rates for Unbundled Network Elements</i> , PUCN Docket No. 00-7012 (Mar. 19, 2001), attached to SBC Br. App. E as Tab 39.
PUCN Recommendation	Recommendation in Support of Nevada Bell Telephone Company's Application to the Federal Communications Commission for Provision of In-Region InterLATA Services in Nevada, <i>In re: Petition for Review and Approval of the Draft Application by SBC Communications, Inc., Nevada Bell Telephone Company and Southwestern Bell Communications Services, Inc., d/b/a Nevada Bell Long Distance, for Provision of In-Region InterLATA Services in Nevada</i> , PUCN Docket No. 00-7031 (Jan. 6, 2003), attached to SBC Br. App. C as Tab 75.
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PwC Schaefer/Murphy Test.	Joint Testimony of Theodore V. Schaefer and James J. Murphy, attached to SBC Br. App. C as Tab 51.
SBC Br.	Brief in Support of Application by SBC for Provision of In-Region, InterLATA Services in Nevada, <i>In re: Application by SBC Communications Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Nevada</i> , FCC WC Docket No. 03-10 (Jan. 14, 2002).

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SBC Dec. 2002 PMs <i>Ex Parte</i>	SBC Communications, Inc., SBC December 2002 Performance Reports, SBC <i>Ex Parte</i> Submission, FCC WC Docket No. 03-10 (Jan. 23, 2003).
SBC Frederick Aff.	Affidavit of Keith Frederick, <i>attached to</i> SBC Track A Reply Comments as Tab 2.
SBC Huston/Lawson Aff.	Affidavit of Stephen D. Huston and Beth Lawson, <i>attached to</i> SBC Br. App. A as Tab 10.
SBC J.G. Smith Aff.	Affidavit of J. Gary Smith, <i>attached to</i> SBC Br. App. A as Tab 19.
SBC J.G. Smith Reply Aff.	Reply Affidavit of J. Gary Smith, <i>attached to</i> SBC Track A Reply Comments as Tab 1.
SBC Johnson Aff.	Affidavit of Gwen S. Johnson, <i>attached to</i> SBC Br. App. A as Tab 12.
SBC Motta/Resnick Aff.	Affidavit of Richard J. Motta and Richard P. Resnick, <i>attached to</i> SBC Br. App. A as Tab 13.
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SBC Track A Reply Comments	“Track A” Reply Comments of SBC Communications, Inc., <i>In re: Application by SBC Communications Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc. for Provision of In-Region, InterLATA Services in Nevada</i> , FCC WC Docket No. 03-10 (Feb. 14, 2003).
SBC Wholesale Performance <i>Ex Parte</i>	SBC Communications, Inc., Nevada Bell and Pacific Bell Wholesale Performance, SBC <i>Ex Parte</i> Submission, FCC WC Docket No. 03-10 (Feb. 19, 2003).
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EVALUATION OF THE
UNITED STATES DEPARTMENT OF JUSTICE

Introduction and Summary

The United States Department of Justice (“the Department”), pursuant to Section 271(d)(2)(A) of the Telecommunications Act of 1996¹ (“the 1996 Act”), submits this Evaluation of the application filed by SBC Communications Inc., Nevada Bell Telephone Company, and Southwestern Bell Communications Services, Inc. (collectively “SBC”) on January 14, 2003, to provide in-region, interLATA services in Nevada. SBC’s application to the Federal Communications Commission (“FCC” or “Commission”) is its first for long distance authority in Nevada and follows its successful Section 271 applications pertaining to California, Texas, Kansas, Oklahoma, Missouri, and Arkansas.² SBC has also filed an application for Section 271 authority in Michigan.³

¹ Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended in scattered sections of 47 U.S.C.).

² See generally *FCC California Order*; *FCC Arkansas/Missouri Order*; *FCC Kansas/Oklahoma Order*; *FCC Texas Order*.

³ The Department’s Evaluation of SBC’s application for long distance entry in Michigan is due to be filed on February 25, 2003, and the FCC is due to issue an order addressing that application on April 16, 2003.

As the Department has explained, in-region, interLATA entry by a regional Bell Operating Company (“BOC”) should be permitted only when the local markets in a state have been “fully and irreversibly” opened to competition.⁴ This standard seeks to measure whether the barriers to competition that Congress sought to eliminate with the 1996 Act have in fact been fully eliminated and whether there are objective criteria to ensure that competitive local exchange carriers (“CLECs”) will continue to have nondiscriminatory access to the facilities and services they will need from the BOC in order to enter and compete in the local exchange market. In applying its standard, the Department considers whether all three entry paths contemplated by the 1996 Act – facilities-based entry involving the construction of new networks, the use of the unbundled elements of the BOC’s network (“UNEs”), and resale of the BOC’s services – are fully and irreversibly open to competitive entry to serve both business and residential customers.

SBC’s application demonstrates that it has succeeded in opening its local markets in Nevada to competition. Based on this record, and subject to the Commission’s assuring itself that the concerns expressed in this Evaluation have been resolved, the Department recommends that the FCC approve SBC’s application.

I. State Commission Proceedings

The Public Utilities Commission of Nevada (“PUCN”) has worked to create an environment conducive to the development of local telecommunications competition in the state. In particular, the PUCN has established and implemented wholesale performance measures⁵; conducted extensive pricing proceedings to establish wholesale rates for UNEs⁶; and adopted a

⁴ See DOJ Oklahoma I Evaluation at vi-vii, 36-51.

⁵ PUCN Recommendation ¶¶ 76-83, 462-63; PUCN PM&IP Order I at 2-3 (adopting performance measurements plan); PUCN PM&IP Order II at 2 (adopting modified performance measurements plan) & Attach. 1 Ex. 1 (Nevada Bell Performance Measurements Plan).

⁶ PUCN Recommendation ¶¶ 58-73, 170, 174; PUCN Pricing Order I at 22-24 (establishing recurring UNE rates); PUCN Pricing Order II at 6 (modifying recurring UNE rates set in PUCN Pricing Order I); PUCN Pricing Order III at 3-4 (establishing non-recurring rates); PUCN Pricing Order IV at 11-12 (establishing

performance incentives plan intended to ensure that an appropriate level of wholesale performance is maintained once SBC's Section 271 application is approved.⁷

The PUCN's review of SBC's Section 271 filing included an independent third-party test by PricewaterhouseCoopers ("PwC") designed to determine whether the operational support systems ("OSS") that SBC uses in Nevada are the same as those it uses in California.⁸ PwC concluded that SBC's assertions that "the operational support systems (OSS) utilized to support competitive local exchange carrier activity in the Pacific Region of SBC Communications, Inc., (which includes both Nevada Bell and Pacific Bell) are the same; or, where the OSS is discernibly separate, it nonetheless can be expected to behave the same way in both states; or, in terms of the manual components of the OSS, the existence of similarities between the states will

additional non-recurring rates). The PUCN has recently initiated a proceeding to reexamine UNE rates. PUCN Recommendation ¶ 174; PUCN Pricing Order V at 2-3.

⁷ PUCN Recommendation ¶¶ 74-83, 467-69; PUCN PM&IP Order I at 2-3 (approving performance incentives plan); PUCN PM&IP Order II at 2 (adopting modified performance incentives plan) & Attach. 1 Ex. 2 (Nevada Bell Performance Incentives Plan).

⁸ SBC Huston/Lawson Aff. ¶ 13; PUCN Recommendation ¶¶ 97-111; *see also FCC California Order* ¶ 72 (concluding that SBC provides CLECs nondiscriminatory access to its OSS in California).

produce similar results” are “fairly stated, in all material respects.”⁹ The PUCN has recommended that the FCC approve SBC’s Section 271 application.¹⁰

II. Entry into the Local Telecommunications Markets

In assessing whether the local markets in a state are fully and irreversibly open to competition, the Department looks first to the actual entry in a market.¹¹ But the Department does not broadly presume that all three entry tracks – facilities-based, unbundled network

⁹ PwC Schaefer/Murphy Test. App. I at 1, 2.

In its California Evaluation, the Department addressed SBC’s failure to meet several performance measures related to the maintenance and repair of UNE-platform lines. *See* DOJ California Evaluation at 3 n.10. The FCC noted the issue but concluded that “these misses [were] narrow and do not reflect discriminatory performance overall.” *FCC California Order* ¶ 87. SBC’s performance in California regarding these maintenance and repair measures has continued to be poor and has even worsened as CLEC volumes have increased since the date of SBC’s California application to the FCC. *See* SBC Dec. 2002 PMs *Ex Parte* at 19-8 (PM 19: Customer Trouble Report Rate), 20-9 (PM 20: Customer Troubles Not Resolved within Estimated Time), 21-10 (PM 21: Average Time to Restore), 23-7 (PM 23: Frequency of Repeat Troubles in 30-Day Period). SBC, relying on California performance to make its Nevada showing, *see* SBC Johnson Aff. ¶ 140, explains that the apparent performance deterioration reflects, in part, the fact that a growing proportion of UNE-platform orders are for residential service, although the retail analog for these measures is business POTS service. *See id.*; SBC Motta/Resnick Aff. ¶ 19; SBC Wholesale Performance *Ex Parte* at 4. SBC claims that residential service generally has more troubles and that these troubles are resolved more slowly than business service troubles, SBC Motta/Resnick Aff. ¶ 19; the measures therefore presumably no longer provide an accurate comparison between SBC’s retail and wholesale performance.

In order to provide a more accurate comparison, SBC and the CLECs have agreed in California to create two performance measures to separate SBC’s maintenance and repair of residential UNE-platform lines from business lines. SBC California PMs *Ex Parte* Attach. B at 81-92, 95-98. The retail analog for these two new measures will be SBC’s maintenance and repair of its retail residential and business POTS lines, respectively. *Id.*; SBC Wholesale Performance *Ex Parte* at 4-5. *But see* SBC Johnson Aff. ¶ 140 n.60 (explaining an apparently outdated proposal that the retail analog would be all retail POTS); SBC Motta/Resnick Aff. ¶ 20 (same). SBC has also proposed to make the same changes to its Nevada performance measurements. SBC Nevada PMs *Ex Parte* Attach. A at 43-49, 52-53. Using the new retail analogs, SBC estimates that its maintenance and repair performance would generally improve. *See* SBC PMs Proxy Study *Ex Parte* at 1-4 (using California data to estimate performance improvements based on a different, but analogous, change to the performance measurements). As the FCC has stated, it will “monitor [SBC]’s performance in the [maintenance and repair] area for compliance with the conditions of approval in this order.” *FCC California Order* ¶ 87.

¹⁰ PUCN Recommendation ¶¶ 50, 479 (finding SBC has satisfied conditions for Section 271 compliance).

¹¹ *See* DOJ Pennsylvania Evaluation at 3-4 (“The Department first looks to actual competitive entry, because the experience of competitors seeking to enter a market can provide highly probative evidence about the presence or absence of artificial barriers to entry. Of course, entry barriers can differ by types of customers or geographic areas within a state, so the Department looks for evidence relevant to each market in a state.” (Footnote omitted.)).

elements (“UNEs”), and resale – are open or closed on the basis of an aggregate level of entry alone.¹²

According to SBC’s data, SBC and CLECs serve a total of approximately 410,800 lines in SBC’s Nevada service area as of November 2002.¹³ Of the total lines in SBC’s service area in Nevada, 41.9 percent, or approximately 171,900, serve businesses, and 58.1 percent, or approximately 238,800, serve residential customers.¹⁴ For business and residential customers combined, SBC estimates that CLECs using all modes of entry serve approximately 39,100 lines, or approximately 9.5 percent of all lines in SBC’s service area in the state.¹⁵

Competitors have made significant progress in penetrating the business market in Nevada. CLECs serve approximately 21.9 percent of all business lines in SBC’s Nevada service area.¹⁶ CLECs serve approximately 16.1 percent of all business lines using primarily their own networks that are either connected directly to the customer premises or connected through loops leased from SBC.¹⁷ CLECs resell SBC’s services to serve approximately 5.8 percent of such lines.¹⁸ CLECs are not using the UNE-platform (a combination of loop, switch, and transport elements) to serve any business lines.¹⁹

¹² See, e.g., DOJ Georgia/Louisiana I Evaluation at 7; DOJ Missouri I Evaluation at 6-7.

¹³ See SBC J.G. Smith Aff. ¶ 8 tbl.1 n.13 (SBC retail lines as of November 2002); *id.* Attach. D at 1, 2 (CLEC lines as of November 2002). There are incumbent local exchange carriers other than SBC in Nevada.

¹⁴ See *id.* ¶ 8 tbl.1 n.13; *id.* Attach. D at 1, 2 (CLEC residential and business lines as of November 2002).

¹⁵ See *id.* ¶ 8 tbl.1 n.13; *id.* Attach. D at 1, 2.

¹⁶ See *id.* ¶ 8 tbl.1 n.13; *id.* Attach. D at 1, 2 (CLECs serve approximately 37,700 business lines).

¹⁷ See *id.* Attach. D at 1 (CLECs serve approximately 27,700 business lines using at least some of their own facilities); *id.* ¶ 8 tbl.1 n.13.

¹⁸ See *id.* Attach. D at 2 (CLECs serve approximately 10,000 business lines via resale); *id.* ¶ 8 tbl.1 n.13.

¹⁹ See *id.* Attach. D at 1.

CLECs serve approximately 0.6 percent of all residential lines in SBC's Nevada service area.²⁰ CLECs serve a very small number of all residential lines through the UNE-platform, and 0.5 percent of such lines by means of resale.²¹ There are no CLECs serving residential customers in Nevada using primarily their own wireline networks that are either connected directly to the customer premises or connected through loops leased from SBC.²²

Given the regional nature of SBC's OSS, the Department evaluates the state of entry regionwide, taking note that pricing or other state-specific factors may significantly affect the degree to which CLECs use a mode of entry in a particular state. The levels of entry in Nevada and the absence of evidence that entry has been unduly hindered by problems with obtaining inputs from SBC, including evidence concerning SBC's California OSS, lead the Department to conclude that opportunities are available to competitive carriers to serve business customers in Nevada. The Department also concludes, due largely to the absence of CLEC complaints in this proceeding and taking into account evidence concerning California, that SBC has fulfilled its obligations to open its markets to residential competition.

III. Track A

Questions have been raised regarding SBC's compliance with the requirements of Track A²³ in Nevada as there appears to be little competition for residential subscribers using

²⁰ See *id.* ¶ 8 tbl.1 n.13; *id.* Attach. D at 1, 2 (CLECs serve approximately 1,300 residential lines).

²¹ See *id.* ¶ 8 tbl.1 n.13; *id.* Attach. D at 1 (CLECs serve approximately 30 lines via UNE-platform); *id.* Attach. D at 2 (CLECs serve approximately 1,300 lines via resale).

²² See *id.* Attach D at 1.

²³ 47 U.S.C. § 271(c)(1)(A) (A BOC is required to have "entered into one or more binding agreements . . . [for] access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers. . . . [S]uch telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier.").

CLECs' own wireline facilities or unbundled elements obtained from SBC.²⁴ In recommending that the FCC approve SBC's application under Track A, the PUCN appears to have examined only evidence regarding the overall level of residential resale service in Nevada and not evidence of a predominantly facilities-based carrier serving residential subscribers via resale,²⁵ although SBC contends that the latter situation may exist.²⁶ Before the Commission, however, SBC has also introduced evidence regarding residential competition from Leap Wireless, a PCS provider.²⁷ SBC contends that Leap's PCS service is a competitive alternative to wireline service for purposes of satisfying Track A requirements and asserts that 18.7 percent of Leap's subscribers in Nevada have substituted the PCS service for local wireline service.²⁸

The FCC has not previously relied on resale or PCS competition to satisfy the Track A residential competition requirement,²⁹ and the PUCN did not address the issue of PCS competition in its recommendation regarding SBC's Nevada application. The Department "defer[s] to the Commission's expert judgment in interpreting its own statute."³⁰ The

²⁴ See WorldCom Comments at 1-7. SBC points to approximately 28 UNE-platform CLEC access lines in Nevada serving residential customers. See SBC J.G. Smith Aff. ¶ 12; see also SBC J.G. Smith Reply Aff. ¶ 4 n.4 (noting that the number of lines has decreased to 24). SBC also contends that one CLEC in Nevada is providing facilities-based residential service to at least 20 customers but that these lines appear in the E911 database as business listings. *Id.* ¶ 8.

²⁵ Compare PUCN Recommendation ¶¶ 112-13, 118 with *FCC Kansas/Oklahoma Order* ¶ 43 n.101 (quoting *FCC Louisiana II Order* ¶ 48).

²⁶ SBC J.G. Smith Aff. ¶ 13; SBC J.G. Smith Reply Aff. ¶ 7.

²⁷ SBC J.G. Smith Aff. ¶¶ 14-21. Leap is a broadband PCS provider which offers local service, without roaming or long distance, to residential subscribers in 40 cities across the United States. Leap Press Release at 1, 2. SBC did not provide any state-specific evidence concerning Leap in its original filing before the FCC, but recently submitted the results of a survey providing specific information on Leap customers in Nevada. See SBC Frederick Aff. ¶¶ 19-23.

²⁸ SBC J.G. Smith Aff. ¶ 21; SBC Frederick Aff. ¶¶ 11, 21. Leap has claimed that more than a quarter of its subscribers across the nation use its PCS service as a substitute for wireline service. Leap Press Release at 1. After filing its application, SBC performed a telephone survey of Leap subscribers in Nevada and 345, or 18.7 percent of those who completed interviews, said that they had replaced a wireline service with Leap's service. SBC Frederick Aff. ¶ 21.

²⁹ See *FCC Louisiana II Order* ¶¶ 31-42; *FCC Kansas/Oklahoma Order* ¶ 43 n.101 (quoting *FCC Louisiana II Order* ¶ 48).

³⁰ DOJ Louisiana I Evaluation at 5.

Commission's conclusion on this specialized issue of statutory construction as applied to the record in this particular state, however, may not be predictive of how the Department would analyze or define any particular telecommunications market or determine market participants in an antitrust matter. Although the FCC's analysis of the Track A issues may be informed by traditional principles of market analysis,³¹ the interpretation of Track A requirements properly has been focused on maintaining the Act's incentives for the development of local competition.³² Thus, the Commission's conclusion for purposes of Track A that a BOC has proved that "more than a *de minimis*" number of customers are served by CLECs³³ would not necessarily be adequate to prove in the context of an antitrust inquiry that alternatives exist for a sufficient number of consumers to constrain a hypothetical price increase. Furthermore, the question of whether a firm is an "actual commercial alternative" for purposes of Section 271 review, viewed in this case from the perspective of whether residential customers have chosen a specialized offering of PCS service as an alternative to SBC's wireline service in Nevada, is not necessarily

³¹ See *FCC Louisiana II Order* ¶¶ 31-34.

³² See *FCC Oklahoma I Order* ¶ 46 ("Thus, by expecting Track A to be the primary means of BOC entry, Congress created an incentive for BOCs to cooperate with potential competitors in the provision of access and interconnection and thereby facilitate competition in local exchange markets."). The Commission appears to have recognized the difficult situation that would be presented if the requirements of the statute were otherwise met, but a BOC that had opened its local market in a state were put into an indefinite limbo that only its competitors could relieve. See *FCC Kansas/Oklahoma Order* ¶ 43 n.101 (quoting *FCC Louisiana II Order* ¶ 48). The Commission has been careful to avoid this "no-man's land" in interpreting the interaction of the requirements of Track A and Track B. See *FCC Oklahoma I Order* ¶ 54. The fact that entrants are not entering a market that is determined to be fully and irreversibly open to competition would seem to be a relevant fact in the question of whether any of the interconnection requests that initially precluded the possibility of a Track B application should still be deemed to qualify as potential Track A requests. *Id.* ¶ 58 (recognizing that "there may be a basis for revisiting our decision that Track B is foreclosed in a particular state. For example, if following such a determination a BOC refiles its Section 271 application, we may reevaluate whether it is entitled to proceed under Track B in the event relevant facts demonstrate that none of its potential competitors is taking reasonable steps toward implementing its request in a fashion that will satisfy Section 271(c)(1)(A)"). The record in this matter does not demonstrate whether such a situation is present in Nevada. SBC applied for Section 271 authority pursuant to Track A, see SBC Br. at 7-12, and the PUCN reviewed the application solely on that basis, PUCN Recommendation ¶¶ 112-18. See also *FCC South Carolina Order* ¶¶ 64-67 (reflecting further on the "reasonable steps" dicta of *FCC Oklahoma I Order* and pointing out that the statute expressly empowers state commissions to nullify the foreclosure of Track B; FCC would give such a certification conclusive effect so long as it was consistent with the statute). The protections of Track B should not be read out of the statute, however, but should remain available to avoid conditioning a BOC's entry in a particular state solely on the actions of entrants who have demonstrated no interest in serving business and residential customers in a local market which has been proven open for both.

³³ *FCC Kansas/Oklahoma Order* ¶ 42.

coincident with the question of whether customers would switch their service in response to a “small but significant and nontransitory” price increase such that it would not be profitable for a “hypothetical monopolist” to impose such a price increase, the inquiry relevant to establishing a market in a merger investigation.³⁴

IV. Conclusion

SBC’s application demonstrates that it has succeeded in opening its local markets in Nevada to competition. Based on this record, and subject to the Commission’s assuring itself that the concerns expressed in this Evaluation have been resolved, the Department recommends that the FCC approve SBC’s application.

Respectfully submitted,

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³⁴ *Horizontal Merger Guidelines* at 5-13.

Certificate of Service

I hereby certify that I have caused a true and accurate copy of the foregoing Evaluation of the United States Department of Justice to be served on the persons indicated on the attached service list by first class mail, overnight mail, hand delivery, or electronic mail on February 21, 2003.

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